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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHN H. DOUGLAS

Petitioner

v.

FIRST SECURITY FEDERAL SAVINGS BANK, et al.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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1146P

QUESTIONS PRESENTED

1. WHETHER MARYLAND LAW OF PRECLUSION, ALLOWING A NONPARTY PARTICIPANT IN A PRIOR SUIT TO BE ESTOPPED BY RES JUDICATA RATHER THAN COLLATERAL ESTOPPEL, VIOLATES THE RIGHT OF DUE PROCESS OF LAW ?

2. WHAT FORMS OF PARTICIPATION AND CONTROL BY A NONPARTY IN A PRIOR SUIT ARE SUFFICIENT OR NOT SUFFICIENT TO ACTUATE THE PRINCIPLES OF PRECLUSION ?

3. WHETHER MARYLAND LAW OF PRECLUSION, ALLOWING THE DOCTRINE OF IMPERMISSIBLE COLLATERAL ATTACK, VIOLATES THE RIGHT OF DUE PROCESS OF LAW ?

4. IN DIVERSITY CASES WHERE FEDERAL LAW GOVERNS THE PRECLUSIVE EFFECTS OF A PRIOR FEDERAL JUDGMENT, SHOULD COURTS APPLY STATE LAWS OF PRECLUSION ON SUBSTANTIVE ISSUES SUCH AS PRIVITY AND FEDERAL RULES OF PRECLUSION ON PROCEDURAL MATTERS ?

LIST OF ALL PARTIES PURSUANT TO RULE 14(b)

John H. Douglas

Petitioner

First Security Federal Savings Bank, Inc

Edwin Rector

Greenberg, Maddox and Shelton, Chartered

Suzanne Hudson

George Marienthal

Elaine Dauphin

Linda G. Witt

Linda M. Layaou

Respondents

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The petitioner, John H. Douglas, pro se, respectfully requests that a writ of certiorari be granted to review the opinion and judgment of the Court of Special Appeals of Maryland.

OPINIONS BELOW

The order denying petitioner's request for reconsideration of the initial denial of petitioner's request for writ of certiorari appears in Appendix A. The opinion of the Court of Special Appeals of Maryland appears in Appendix B.

Jurisdiction

The Court of Appeals of Maryland denied petitioner's request for a writ of certiorari on November 10, 1994.

And after petitioner's timely filing of a reconsideration request, the Court of Appeals of Maryland denied that request on January 11, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

THE FOURTEENTH (14th) AMENDMENT in relevant part provides that:

> No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law.

The FIFTH (5th) provides that :

> No person shall be...deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

In June, 1989, Mr. and Mrs. Baker and petitioner entered into a sales contract wherein the Bakers would purchase an improved lot in Fort Washington, Maryland from petitioner for $61,000. Petitioner agreed in the contract to (1) take back $15,000 as a recorded lien and (2) subordinate his

interest to the lender who would finance the Bakers' construction loan. The Bakers' applied for a loan through Morgan Investment Co., Inc, a mortgage broker, who placed the loan with First Security Federal Savings Bank, Inc. **(hereafter Bank)**. Petitioner was told by George Farrell of Morgan Investments and Suzanne Hudson of the Bank that the Baker loan had been approved along with Baker's draw schedule but that Appellant would have to extend the take back to $18,000. Appellant agreed and settlement was scheduled for November 15,1989. Since the Bakers were short an

additional $3,900, the settlement attorney called Ms Hudson of the Bank and obtained approval for the increase of the second lien to $21,900.

During the construction of the dwelling, a dispute developed between the Bakers and the Bank as to whose draw schedule would be used to disburse funds. The Bank refused to make any additional draws and the Bakers were unable to make interest payments on the loan. The Bank then initiated foreclosure procedures. As a result, the Bakers sued the Bank in federal district court in Alexandria, Virginia for fraud, wrongful foreclosure, and various RICO counts. That Virginia

suit was dismissed. In November, 1992 petitioner's attorney filed suit in Prince George's County, Maryland against First Security Federal Savings Bank, Inc. et al (Case Number CAL 92-20856) to recover damages for fraud and wrongful foreclosure. Also in November, 1992 the Bakers filed a suit in Prince George's County Circuit Court in a case styled Danella Baker and Vinson L. Baker v First Security Federal Savings Bank, Inc., et al, case number Cal 92-20920.

On February 12, 1993, petitioner filed an " Amended Complaint To Recover Damages For Fraud, Wrongful Foreclosure, and Violations Of Maryland Real Property Articles ".

The respondents filed a motion to dismiss based on the doctrines of res judicata and forum non convenient. That motion was granted without comment. Petitioner then filed a request for a hearing. At the hearing the Circuit Court requested each party to submit a memorandum on the issues in the case. Citing **Virginia Hosp. Ass'n v Baliles 830 F.2d 1308, (4th Cir.,1987)**, petitioner argued that he was not in privy with Baker in the Virginia action and that he had no control over the Baker case since he had no effective choice as to legal theories and proofs to be advanced in behalf of Baker and since he had no control over the opportunity to obtain appellate review.

Petitioner argued that nonparties who control a prior suit are precluded by collateral estoppel and not res judicata pursuant to this Court's decision in **Montana v United States 440 U.S. 147, 154 (1979)**.

Citing this Court's decision in **Chase National Bank v Norwalk, 291 U. S. 431 (1934)**, petitioner argued that federal law does not require a nonparty to intervene in a case in order to protect his legal rights.

Additionally, petitioner argued that state law of preclusion should only be applied against a party in a prior federal suit wherein the issues go to the stability of legal relationship such as

privity, but that state law should not be applied throughout the preclusive process.

An "Opinion And Order of Court", was issued by the trial court on November 2,1993 dismissing the case based on the principles of res judicata and impermissible collateral attack. The trial court also ruled that state law of preclusion applied throughout in this case.

On November 15,1993, petitioner appealed to the Court of Special Appeals and that Court on July 5, 1994 affirmed the trial court's decision. The Court of Special Appeals ruled that " **Sufficient evidence exists to support the trial court's findings that appellant was**

involved in the Virginia action, that he had a direct financial interest in the action, that he had a right to intervene (which he chose not to exercise), that he had the right it [to] control the litigation, and that his interests were represented and received actual and efficient protection. (Appendix B, page A-46 thru A-47).

Presented with this Court's decision in **Montana, supra,** that a nonparty who controls a prior suit is precluded by collateral estoppel and not res judicata, the Court of Special Appeals stated that **"Appellant cites Montana, 440 US 147 (1979), for the proposition that collateral estoppel, not res judicata.**

applies to actions by nonparties, because of action by a nonparty is, by definition different from any preceding action. But because the trial court correctly determined that appellant was a party to the Bakers' suit for purposes of res judicata, his circuit court action was not, by definition, different. (Appendix B, page A-54 thru A-55).

The Court of Special Appeals also stated that petitioner's right to control the prior Virginia action is directly related to his right to intervene: **The fact is that Appellant... never attempted to intervene in the Virginia action. The trial court cites Reddick v State 213 Md 18, 30 cert. denied 355 US 832 (1957), for**

the well established principle of law that a person who has full knowledge of pending litigation and that it affects, and will determine his rights, and who is entitled to appear, but who makes no effort to intervene as a party, and permits a conclusion thereof without objection, such a person is concluded by the proceedings as effectively as if he were named on the record." (See Appendix B, pages A-44 thru A-45).

Petitioner filed a timely request for writ of certiorari in the Court of Appeals of Maryland, Docket No. 319, September Term 1994 and on November 10, 1994 that request was denied. Petitioner's request for reconsideration, based on this Court's

decision in **Martin v Wilks** **490 US 755 (1989)** not requiring intervention of a nonparty, was also denied by the Court of Appeals of Maryland on January 11, 1995.

REASONS FOR GRANTING THE WRIT

Maryland laws of preclusion allowing a nonparty participant in a prior suit to be precluded by res judicata from further litigation and the imposition of the doctrine of impermissible collateral attack are in direct conflict with rulings by this court.

1. Maryland law of preclusion, allowing a nonparty participant in a prior suit to be estopped by res judicata rather than collateral estoppel, violates the

nonparty's right of due process of law.

This court in **Montana v United States 440 US 147, (1979)** at page 153, defines res judicata and collateral estoppel:

> **A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a " right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction... cannot be disputed in a subsequent suit between the same parties or their privies..." Under res**

judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action... Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based a different cause of action involving a party to the prior litigation. Citations omitted.

In order to be precluded by res judicata from litigating issues that were or could have been litigated, three

conditions must be satisfied: **(1)** there must be identity of parties, **(2)** there must the same cause of action, and **(3)** there must be a final judgment on the merits by a court of competent jurisdiction. **Montana v United States 440 US 147, 153 (1979); Brown v Felsen 442 US 127, 132 (1979); Allen v McCurry 449 US 90, 94 (1980).**

(1) Identity Of Parties

The trial court ruled that your Petitioner was not in privity with Baker in the Virginia action : **If privity is given the general accepted meaning of one who succeeded to an estate or interest held by one who was a party to such judgment or decree, if the succession occurred after**

the bringing of the action. (Appendix B, page A-33).

Citing **Ugast v LaFontaine 189 Md 227,(1947)**, the Maryland Court of Special Appeals affirmed the trail court's ruling that, although your petitioner was not a party of record in the Virginia action, your petitioner was nevertheless a party for the purpose of res judicata since the court erroneously found that your petitioner assumed control of the Baker Virginia suit:

> **Generally, the parties to a suit are those persons who are entered as party of record. But for the purpose of the application of the rule of res**

judicata, the term " parties " includes all persons who have a direct interest in the subject matter of the suit, and have a right to control the proceedings, make defense, examine the witness, and appeal if an appeal lies. So where persons although not formal parties of record have direct interest in the suit, and in the advancement of their interest take open and substantial control of its prosecution, or they are so far represented by another that their interests receive actual and efficient

protection, any judgment recovered therein is conclusive upon them to the same extent as if they had been formal parties. Id 231. (See Appendix B, page A-36).

The Maryland Court of Special Appeals also ruled that evidence showed that your petitioner had direct financial interest in the Baker case and that your petitioner had the right to intervene and control the Virginia action:

Sufficient evidence exists to support the trial court's findings that appellant was involved in the Virginia action, that he had a direct financial

interest in the action, that he had a right to intervene (which he chose not to exercise), that he had the right it [to] control the litigation, and that his interests were represented and received actual and efficient protection. (Appendix B, page A-46 thru A-47).

Even if it were true that your petitioner was a " party " by participation in the Baker Virginia action, an assertion that your petitioner denies, then that assessment only satisfies one of the requirements for the imposition of res judicata, namely identity of parties. However, the Maryland

Court of Special Appeals ignored the mutuality requirement for the application of res judicata.

This court in **Nevada v United States 463 US 110, 143 (1983)** ruled that mutuality of parties is required when applying the doctrine of res judicata: **While mutuality has been for the most part abandoned in cases involving collateral estoppel,...it has remained a part of the doctrine of res judicata. See United States v Mendoza 464 US 154, 159 (1984); Allen v McCurry Curry 449 US 90, 94-95, 1980.**

It is evident that the Baker Virginia judgment is not binding on your petitioner **(See Va. judgment Appendix C, page A-56)**

and furthermore if Baker had prevailed in the Virginia action, your petitioner could not use that judgment as res judicata against the respondents. The Maryland Appeals court ruling is in direct conflict with this court's ruling that mutuality is required for the application of res judicata.

(2) Same Cause Of Action

This court in **Montana v United States 440 US 147 (1979)** uses similar language as in **Ugast, supra,** concerning a party by participation or nonparty participant, but reaches a totally different conclusion form the ruling by the Maryland Court of Special Appeals. This court in **Montana** states that a nonparty who has direct

financial interest in the prior suit and controlled the prosecution of that suit may be subject to the preclusive effects of collateral estoppel and not res judicata since res judicata requires identity of the causes of action and the cause of action that a nonparty asserts in his own right differs by definition from that which he tried to assert through another:

> **These interest are similarly implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously**

resolved...[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense an action in aid of some interest of his own ... is as much bound... as he would be if he had been a party to the record.[Quoting from Souffront v Compagnie des Sucreries, 217 US 475, 486-487]. Preclusion of such nonparty falls under the rubric of collateral estoppel rather than res judicata because the latter doctrine presupposes identity between causes of

> action. And the cause of action which a nonparty vicariously asserted differs by definition from that which he subsequently seeks to litigate in his own right. Id., 154.

Followed in Virginia Hosp. Ass'n v Baliles 830 F.2d 1308, 1312 (4th Cir. 1987); Mellon Bank, N.A. v Ternisky 999 F.2d 791,796 n. 7 (4th Cir. 1993); Carter v City of Emporia, Kan. 815 F.2d 617, 620 n. .3 (10th Cir 1987); Benson and Ford, Inc. v Wanda Petroleum Co., 833 F.2d 1172, 1174 (5th Cir. 1987); In Re Bendectin Products Liability Litigation, 732 F.Supp 744, 746-747(E.D. Mich. 1990).

In Montana, the United States

government stipulated that it (1) Required the Kiewit I lawsuit to be filed; (2) Reviewed and approved the complaint; (3) Paid the Attorney's fees; (4) Directed the appeal from the state district court to the Montana Supreme Court; (5) Appeared and submitted a brief as amicus in the Montana Supreme Court; (6) Directed the filing of the notice of appeal; (7) and Effectuated Kiewit's abandonment of that appeal on the advice of the Solicitor General. Even presented with the above stipulation, this court ruled that the United States government was estopped by collateral estoppel and not res judicata.

The Court of Special Appeals tried to reconcile its decision, that Your

Petitioner was precluded by re judicata from further litigation, with this court's ruling in Montana, id. by stating that " Appellant cites Montana, 440 US 147 (1979), for the proposition that collateral estoppel, not res judicata. applies to actions by nonparties, because of action by a nonparty is, by definition different from any preceding action. But because the trial court correctly determined that appellant was a party to the Bakers' suit for purposes of res judicata, his circuit court action was not, by definition, different." (Appendix B, page A-54 thru A-55).

It is apparent that what the Maryland courts are denominating as "Party", this

court in Montana is calling "Nonparty Participant".

The cause of action of your Petitioner, a mortgagee, is totally different from that of Mr. Baker, a mortgagor.

(3) Final Judgment On The Merits By A Court Of Competent Jurisdiction

The federal district court ruled that it had diversity of citizenship jurisdiction of the Baker Virginia action **(See Appendix C, page A-58)**. Mr. Vander Woude, one the Respondents' attorneys stated in trial court that the Bank is incorporated in the state of Delaware **(See Appendix D, page A-61)** which makes the Bank a dual citizen of Maryland and

Delaware pursuant to **28 USCA 1332(c)(1)**. And since Baker was a citizen of Delaware when the suit was filed in Virginia, your Petitioner asserts that the Federal district court did not have jurisdiction because there was no diversity of citizenship as required under **28 USCA 1332(a)(1)**; **Strawbridge v Curtiss 3 Cranch(7 US) 267 (1806)**; **Owen Equipment and Erection Co. v Kroger, 437 US 365,373 (1979)**; **Smith v Sperling 354 US 91 (1957)**; **American Fire & Gas Co. v Finn 341 US 6 (1951)**; and **City of Indianapolis v Chase National Bank of City of New York, 314 US 63,69 (1941)**.

Even assuming that your Petitioner was a party by participation in the prior

suit, an assertion he denies, two requirements for the imposition of res judicata have not been met (mutuality of parties and identity of causes of action). Hence the Maryland Court of Special Appeals erred when it affirmed the imposition of res judicata.

2. Petitioner's Participation In Prior Virginia Action was Not Sufficient To Actuate The Principles of Preclusion.

This court in **Litchfield v Crane 123 US 549, 551 (1887)** ruled that a party, a party by participation, or nonparty participant is bound by the judgment of a prior suit if he had a right to control

the prior litigation and appeal from the judgment:

> **Under the term parties, in this connect, the law includes all who are directly interested in the subject matter and had a right to make defense or to control the proceedings and to appeal from the judgment. This right involves also the right to adduce testimony and to cross examine the witnessers adduced on the other side. Persons not having these rights are regarded as strangers to the cause. Also see Montana v United States 440 US 147, 154 (1979); Bigelow v**

Old Dominion Copper Min. & S. Co. 225 US 111, 126 (1912); Stryker v Goodnow's Admir. 123 US 527,(1887)

The Maryland Court of Special Appeals stated that there is factual evidence to show that your petitioner through a retainer agreement sought to gain direct financial interest in the Baker action **(Appendix B, page A-41)**. But your Petitioner asserts that the retainer agreement has no legal effect since that document was not executed by Mrs. Baker. And the Maryland Court of Specials agrees that the retainer agreement has no legal effect: **Appellant's signature, however, indicate an intent to be bound by the**

agreement. Had Mrs. Baker signed it at any time, appellant would be bound by its terms. (Appendix B, page A-41).

But the fact of the matter is that Mrs. Baker did not sign that document and hence the agreement has no legal effect and should not be relied on by this court to show that your petitioner had direct financial interest in the Baker suit. In Addition, that agreement did not give your petitioner the right to control the Baker Virginia action, make a defense, adduce testimony, and cross examine the witnesses adduced on the other side. And the retainer agreement did not give your petitioner the right to appeal the Virginia judgment. These collective rights

were reposed in Mr. Baker and Mr. Baker exercised his rights by entering into a settlement agreement with the Bank wherein he agreed in part to not pursue the filed appeal (No. 92-2488) in the United States Court of Appeals for The Fourth Circuit. **(Appendix F, page A-67).**

In Baker's Virginia Attorney's Motion to Withdraw form the filed appeal in the Fourth Circuit Court of Appeals, Mr. LaPrade stated that: **"Mr. Baker has refused to sign any agreement authorizing representation or payment for the appeal whatsoever, or to recognize his obligation to counsel, John C. LaPrade." (Appendix E, page A-63).**

Your petitioner simply had no control

over the opportunity to obtain appellate review.

The Tenth Circuit Court of Appeals in **Benson and Ford, Inc. v Wanda Petroleum Co. 833 F.2d 1172 at 1174 (5th Cir 1987)** rules that there must be actual control over litigation of the prior suit in order to actuate the doctrine of preclusion:

To have control of litigation requires that a person have effective choice as to legal theories and proofs to be advanced in behalf of the party to the action. He must have control over the opportunity to obtain [Appellate] review... It is essential that nonparty have actual control. See eg. Montana v United States 440 U. S. 147, 99 S. Ct. 970, 59 L. Ed.2d

210(1979); Freeman 771 F.2d at 864 n.3.

Since the Maryland Court of Special Appeals has ruled that your Petitioner's **" right to control the proceedings, assert a defense, examine witnesses, and appeal is directly related to his right to intervene " (Appendix B, page A-43).** then it is ruling that your Petitioner did not have actual control over the Baker Virginia action.

This ruling by the Maryland Court of Special Appeals is in direct conflict with rulings by this court in **Montana** and the rulings of Federal Courts of Appeals.

Maryland Court of Special Appeals stated that your Petitioner (1) attended at one deposition in the Virginia action,

(2) met with witnesses, and (3) introduced Baker to Baker's Virginia attorney. **(See Appendix B, page A-45).**

Pursuant to rulings in the federal courts of appeals, those forms of participation are not sufficient to actuate the principles of preclusion since it must be shown that a nonparty had a right to control and did actually control the litigation in the prior suit.

The Fourth Circuit Court of Appeals in **The Virginia Hosp. Ass'n v Baliles 830 F.2d 1308, (4th Cir.,1987)** states certain forms of participation or involvement by a nonparty in a prior suit are not sufficient to actuate the principles of preclusion: **" It is not**

sufficient, however, that the person merely contributed funds or advice in support of the party, supplied counsel to the party, or appeared as amicus curiae... Moreover, a nonparty is not deemed to have control over litigation simply because he procures witnesses or evidence for a party to the suit. Id., 1313. In accord Benson Ford, Inc. v Wanda Petroleum Co. 833 F.2d 1172 (1987).

The Fourth Circuit Court of Appeals also ruled that Virginia Hospital Association's presence at one deposition and asking one question was not enough to actuate the principles of preclusion.

And as a matter of law, your

petitioner is a stranger to the cause.

3. Maryland Preclusive law, allowing the imposition of the doctrine of impermissible collateral attack, violates the right of due process of law.

The trial court also ruled that your petitioner's **" right to control the proceedings, assert a defense, examine witnesses, and appeal, is directly related to his right to intervene ". (Appendix B, pages A-43).**

The Maryland Court of Special Appeals invoked the principle of impermissible collateral attack by ruling that since your petitioner knew of the Virginia

action and that it would determine his rights, your petitioner is precluded from litigating the issues since he did not exercise his right to intervene:

> **There was some disagreement about whether Appellant's intervention in the Virginia action would destroy federal jurisdiction. The trial court found that it would not. We need not, however, resolve that question. The fact is that Appellant, who was intimately familiar with the litigation and who now presents an almost identical claim, never attempted to intervene in the Virginia**

action. The trial court cites Reddick v State 213 Md 18, 30 cert. denied 355 US 832 (1957), for the well established principle of law that a person who has full knowledge of pending litigation and that it affects, and will determine his rights, and who is entitled to appear, but who makes no effort to intervene as a party, and permits a conclusion thereof without objection, such a person is concluded by the proceedings as effectively as if he were named on the record. (See Appendix B, pages A-44 thru A-

45).

This court in **Martin v Wilks** 490 US 755 (1989) rejected the principle of impermissible collateral attack by ruling that a nonparty is not obliged to intervene in a case in order to protect his legal rights:

> **Petitioners argue that, because respondents failed to timely intervene in the initial proceedings, their current challenge to actions taken under the consent decree constitutes an impermissible "collateral attack." They argue that respondents were aware that the underlying suit might affect**

them, and if they chose to pass up an opportunity to intervene, they should not be permitted to later litigate the issues in a new action. The position has sufficient appeal to have commanded the approval of the great majority of Federal Courts of Appeals, but we agree with the contrary view expressed by the Court of Appeals for the Eleventh Circuit in these cases. We begin with the words of Justice Brandeis in Chase National Bank v Norwalk, 291 U. S. 431 (1934): " The law does not impose upon any person

absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger...Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights". Id. at 441.

While these words were written before the adoption of the Federal Rules of Civil Procedure, we think the Rules incorporate the same principle; a party seeking a judgment binding on another cannot

obligate that person to intervene; he must be joined. Martin, Id. at 762-763.

This court in **Martin** ruled that it is the responsibility of the parties of record to join other paries in order to bring them under the jurisdiction of the court, thus binding them to a judgment. And this court further ruled in **Martin** that a nonparty's knowledge of the suit and his opportunity to intervene will not bind hem to a court's judgment or decree:

Joinder as a party, rather than knowledge of a suit and an opportunity to intervene, is the method by which potential parties are subject to the

jurisdiction of the court and bound by a judgment or decree...The linchpin of the " impermissible collateral attack" doctrine - the attribution of preclusive effect to a failure to intervene - is therefore quite inconsistent with Rule 19 [Joinder] and Rule 24 [Intervention]. Id. 765. Also See Gratiot State Bank v Johnson 249 U. S. 246, 249-250 (1919).

In the instant case, if respondents thoughts that your petitioner should be a party under the Federal District Court jurisdiction such that he may be bound by a judgment, then the respondents , not

your Petitioner, should have moved the court to join your petitioner to the suit. They did not and under **Martin** your Petitioner needed not to intervene in the Virginia action in order to protect his legal rights.

The Respondents argued in their opposition to the motion for reconsideration in the Maryland Court of Appeals that this court's ruling in **Martin** does not apply to the well established state law allowing the imposition of the doctrine of impermissible collateral attack. However, under **Martin** no state court can require a nonparty to intervene in a federal proceeding to protect his rights when this court does not require

it.

Additionally, your Petitioner's intervention in the Virginia action would destroy complete diversity of citizenship which is required under **28 USCA 1332(a)(1); Strawbridge v Curtiss 3 Cranch(7 US) 267 (1806); Owen Equipment and Erection Co. v Kroger, 437 US 365,373 (1979); Smith v Sperling 354 US 91 (1957); American Fire & Gas Co. v Finn 341 US 6 (1951); and City of Indianapolis v Chase National Bank of City of New York, 314 US 63,69 (1941). (Also see Krueger v Cartwright 996 F.2d 928, 931 (7th Cir 1993)).** Your Petitioner resides in Maryland and the Bank's principle place of business is in Maryland.

The Maryland Court of Special Appeals' ruling imposing the principle of impermissible collateral attack is in direct conflict with the rulings of this court in **Martin** and is in violation of your Petitioner's right of due process.

4. In Diversity Cases, Federal Rules Of Preclusion Should Govern The Preclusive Effects Of A Prior Federal Judgment. However, Courts Should Apply State Laws Of Preclusion On Substantive Issues Such As Privity And Federal Rules Of Preclusion On Procedural Matters ?

The word privity is an elusive term, the definition of which has been expanded over the decades to include a host of

legal concepts. Many courts have included nonparty participation and control of a prior suit as part of privity.(**See Meza v General Battery Corp. 908 F.2d 262,1266 (5th Cir. 1990); Spiker v Capitol Milk Producers Co-op, Inc. 577 F. Supp. 416, 418 (1983))**. The 5th Circuit Courts of Appeals in **Terrell v Deconna 877 F.2d 1267 (5th Cir. 1989)** also includes the legal concept of derivative claim as part of privity:

Although close family relationships will not alone suffice to establish privity between successive parties for purpose of issue or claim preclusion, the relevant considerations differ when, as in this case but unlike in Freemen, the

successor plaintiff's claims are also derivative from the first plaintiff's claim. In that instance, we will apply the Restatement rule, and permit the twice-sued defendant to raise issue preclusion defenses in the subsequent suit by a spouse raising derivative claims. Id. 1272.

This court in Litchfield v Crane 123 U.S. 549,551 (1887) defined privity as denoting " mutual or successive relationship to the right of property."(Also see Bigelow v Old Dominion C. Min. & S. Co. 225 U.S. 111, 129 (1912). In the instant case, the Maryland trial court used the Maryland State definition of privity as it relates to preclusion: one

who has succeeded to an estate or interest held by one who was a party to such judgment or decree, if the succession occurred after the bringing of the action (Appendix B, page A-33).

In **Montana**, this court clearly states that a nonparty participant who had direct financial interest and assumes control of a prior litigation does not fall within the concept of privity:

> **Although the term " privies "has been used on occasion to denominate nonparties who control litigation...[t]he nomenclature has been abandoned in the applicable section of the Second Edition of Restatement...**

Montana v United States 440 US 147, at 154 n.5 (1979).

Your Petitioner asserts that since the trial court found that your Petitioner was not in privity with Baker in the Virginia action and since nonparty participation is not within the concept of privity and hence does not go to the stability of legal relationships, the trial court should have concluded the application of the Maryland state law of preclusion and there after should have applied the federal law of preclusion.

The Maryland Court of Special Appeals based its decision that Maryland law governs the preclusive effects of a prior federal judgment in this case on a

federal court's ruling in **Spiker v Capitol Milk Producers CO-OP, Inc. 577 F. Supp. 416 (1983)**. That federal court ruled that state law of preclusion should be used when substantive issues are at stake and federal law of preclusion should be used when procedural matters needed to be addressed: **This court shall apply federal law when considering the effects of a previous judgment in this court. Nevertheless state law will be adopted where substantive rather than procedure is at stake. Id 418.**

The federal district court in **Spiker** based its ruling primarily on legal opinions from Restatement (Second) of Judgments and **Erie R.R. v Tompkins, 304**

U.S. 64 (1938). Citing Restatement, the federal court stated:

> For example, the concept of "privity" in res judicata doctrine reflects a distinctly substantive policy, because privity arises from " considerations going to stability of legal relationships - not unlike definitions of property." Restatements (Second) of Judgments Section 87 comment b (1980)."

Your petitioner asserts that since Restatements does not include nonparty participation as a part of the concept of privity (See Montana, 154 n.5), one can

only conclude that the legal scholars of Restatements do not consider nonparty participation as a substantive state policy and that the issue of nonparty participation does not arise from considerations going to the stability of legal relationships.

In **Erie**, this court sought to re-establish the stability of legal relationships in the states by reversing a ruling it made in **Swift v Tyson , 16 Pet. 1, 18 " that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court, that they are free**

to exercise an independent judgment as to what the common law of the State is or should be. Erie, 71.

In order to take advantage of this decision, some private citizens and corporations changed their citizenship. " **[I]ts Chief effect has been to render it difficult for business men to know in advance to what particular topic the court would apply the doctrine.**

The ruling in **Swift** undermined states' rights and laws: " **In addition to questions of purely commercial law, "general law" was held to include the obligations under contracts entered into and to be performed within a state... Furthermore, state decisions construing**

local deeds, mineral conveyances, and even devises of real estate were disregarded." **Id., 75-76.**

It is clear that this court through **Erie** sought to establish stability of legal relationship such as privity. But privity should be narrowly defined to include a state's recognized legal relationships between parties such as assignor and assignee, landlord and tenant, principal and agent, employer and employee, the president and sole shareholder of a company, a parent corporation and its subsidiary, liability insurer and the insured, successor to an estate, a trustee and those he/she represents, and etc. These are the legal

relationships that this court had in mind in **Erie** and not nonparty participation and derivative claims.

Hence your Petitioner asserts that federal law and not state law should have been applied after by the trial court used state law to determine that your Petitioner was not in privity with Baker in the Virginia action. Federal law, determining the sufficiency of nonparty participation and the identity of cause of action should have been used.

The Maryland Court Of Special Appeals applied state law throughout the preclusive process, thus in effect ruling that the preclusive process itself is a substantive state matter: **"[T]he court**

looks to see if privity, the legal relationship of parties, or some other substantive issue must first be decided; if it must, then state res judicata analysis properly governs." (Appendix B, pages A-27).

In addition, the Fifth Circuit Court of Appeals' ruling in **Terrell v DeConna 877 F.2d 1267, 1272-1273 (5th Cir 1989),** applying federal law of preclusion, differs from rulings of the Fourth circuit Court of Appeals in **Harnett v Billman 800 F.2d 1308, 1313 (4th Cir 1986)** and **Brooks v Arlington Hos. Ass'n 850 F.2d 191 (4th Cir 1988)**. The Fourth Circuit held that federal law of preclusion should be applied to procedural matters and state

law of preclusion should be applied to substantive issues. The Ninth Circuit Court of Appeals also approved of the rule in **Northwest Acceptance Corp. v Lynnwood Equipment, Inc. 841 F.2d 918 (9th Cir 1988)**. It appears that not all the federal courts are in agreement on this issue.

CONCLUSION

Maryland laws of preclusion violate the Fifth and Fourteenth Amendments to the United States Constitution. Maryland law of preclusion which states that a party by participation or a nonparty

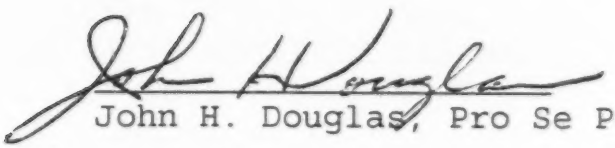
participant is precluded by res judicata rather than collateral estoppel is in direct conflict with rulings of this court in **Montana v United States 440 U.S. 147 (1979).** Maryland law of preclusion allowing the imposition of the doctrine of impermissible collateral attack is in direct conflict with rulings of this court in **Martin v Wilks 490 U.S. 755 (1989).** And Maryland law of preclusion not applying the requirement of mutuality in regards to res judicata is in direct conflict with this court's ruling in **Nevada v United States 463 U.S. 110 (1983).**

Based on arguments herein stated, your Petitioner respectfully requests that this

court grant a writ to hear the constitutional issues in this case.

DATED : March 30,1995

Respectfully submitted,



John H. Douglas, Pro Se Petitioner

APPENDIX A

JOHN H. DOUGLAS	*	In the
	*	Court Of
V	*	Appeals
	*	Maryland
	*	September
Term 1994		
FIRST SECURITY FEDERAL	*	
SAVINGS BANK, INC.	*	Court Of
et al.	*	SPECIAL
	*	Appeals
		(No. 1830)

O R D E R

Upon consideration of the motion for reconsideration filed in the above entitled case, the response to petitioner's request for reconsideration request, the motion to strike

respondent's response to reconsideration request from the record and a motion for sanctions for the willful violation of MD Rule 8-606(a), it is this 11th day of January, 1995

Ordered, by the Court of Appeals of Maryland, that the motions be and they are hereby, denied.

/s/ Robert C. Murphy

Chief Judge

APPENDIX B

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

NO. 1830

SEPTEMBER TERM, 1993

JOHN H. DOUGLAS

v.

FIRST SECURITY FEDERAL
SAVING BANK, INC., ET AL.

MOYLAN,
CATHELL,
BELL, ROSALYN B.
(retired , specially
assigned),
J J .

OPINION BY CATHELL, J.

FILED: JULY 5, 1994

John H. Douglas, appellant, appeals from a

decision of the Circuit Court for Prince George's County dismissing his complaint against First Security Federal Bank (Bank), several bank employees, members of the law firm representing the bank, and several of the firm's employees (hereafter referred to collectively as "appellees"). Appellant's complaint, alleging fraud, wrongful foreclosure, and violation of Maryland property statues, was dismissed as barred by the doctrine of res judicata. After final judgment was entered by the circuit court, appellant filed a notice of appeal, but, before transmission of the record to this court, appellant filed an additional affidavit with the circuit court clerk. Appellees objected to its

inclusion in the record and moved the circuit to strike the affidavit from its record and the record on appeal. that motion was granted. Appellant filed a second appeal from the order striking his affidavit and moved to consolidate the appeals.

Appellant presents seven issues, which we reformulate and consolidate as follows:

A. Whether the trial court erred in striking the " Second Affidavit of John H. Douglas from the circuit court record and the record on appeal.

B. Whether the trial court properly applied Maryland law to the re judicata issues raised.

C. Whether the trial court erred in

finding that appellant's participation in a prior suit was sufficient to actuate the principles of res judicata, and that application of res judicata principles barred appellant's suit.

Appellant also asks whether the trial court properly dismissed his case" in light of the fact that Judge Ross denied Appellees' motion to dismiss the Baker's [sic] suit?" We shall answer this question in summary fashion after our discussion of the facts.

FACTS

In June, 1989, Vinson and Danella baker (the Bakers) entered into a contract to purchase, from appellant, an undeveloped lot in Fort Washington,

Maryland. The Bakers agreed to purchase the lot alone for $61,000, and appellant agreed to take back a mortgage of $15,000, contingent upon the Bakers' obtaining other financing for the balance. The Bakers eventually secured a loan from the bank in the amount of $185,000 to finance the lot and construction of a home. Appellant agreed to increase the amount of the mortgage he would take back to approximately $22,000 and to subordinate his mortgage to the banks' mortgage in order to help the Bakers secure the bank loan. The loan settled on November 15, 1989. There was a dispute as to the loan's draw schedule, and the Bakers eventually defaulted on the loan from the bank.

The bank initiated foreclosure proceedings. Soon after, the Bakers filed an action against the bank in the United States District Court for the District Of Columbia, alleging breach of contract and requesting a temporary restraining order to stop the foreclosure proceedings in Prince George's County. The Court allowed the Bakers to dismiss this first suit without prejudice and refile it in the Circuit Court for Prince George's County. They did so and requested an ex parte injunction to stay the foreclosure. The circuit court granted a temporary injunction pending a full hearing on the merits. A hearing was held on the merits and the injunction denied. Thereafter, the

court declined to set the sale aside.

Approximately two months later, the Bakers filed a bankruptcy petition in the United States Bankruptcy Court for the District of Columbia. Appellant, based upon his status as a subordinate lien (second Mortgagee) holder, Unsuccessfully attempted to intervene in that proceeding. The bakers thereafter filed suit against the bank, this time in the United States District Court for the Eastern District of Virginia, alleging, among other things, bank fraud and wrongful foreclosure. Appellant, apparently in an effort to enhance his subordinate position, entered into a retainer agreement with the Bakers and their attorney prior to the Virginia

federal court action. Appellant agreed, under specific circumstances, to pay the Bakers' costs and attorney's fees; the agreement also entitled him to receive fifty percent of any recovery in the Bakers' suit against the bank. Appellant attended at least one deposition in preparation for the Virginia suit, and met with witnesses and counsel on several occasions. All counts in the Virginia suit were disposed of either by motion to dismiss or summary judgment, and the Bakers appealed to the Fourth Circuit Court of Appeals.

Vinson Baker states, in an affidavit included in the record extract, that appellant chose his attorney for the

bankruptcy and Virginia actions, paid his legal fees, located witnesses and directed strategy for the litigation. Appellant and the Bakers' former attorney each filed an affidavit denying that appellant retained the attorney for the Bakers, chose the forum for, or controlled that litigation.

On November 11, 1992, appellant and the Bakers each filed separate suits against appellees in the Circuit Court for Prince George's County, alleging fraud and wrongful foreclosure, among other things. Appellees filed motions to dismiss in both cases. The Bakers subsequently entered into a settlement agreement with appellees and dismissed their circuit court action, and the appeal pending before the Fourth

Circuit. The circuit court, on March 11, 1993, dismissed Appellant's suit. Appellant filed a motion to reconsider and, after extensive briefing and oral argument, the circuit court, in a twenty-six page written opinion filed on November 8, 1993, denied his motion and dismissed his complaint as being barred by the doctrine of res judicata. Appellant filed a timely notice of appeal on November 15, 1993. On December 21, 1993, appellant filed an affidavit with the circuit court clerk; appellees objected and the court struck the affidavit from the record. Appellant appealed that order, and today we address the propriety of both of the circuit court's orders.

Appellant argues that the " court should not have initially dismissed [appellant's] complaint in light of [the] fact that another Prince George's Judge denied appellees' motion to dismiss the Bakers' suit." Appelant offers no authority for the proposition that circuit court judges are bound by the rulings of their brethren in separate cases, or as to why a ruling in a case he claims is unrelated to his should affect the court's decisions in his case. In **Washburne v Hoffman, 242 Md. 519, 525 (1966)**, the court of appeals said: While we are confident Judge Turnbull's colleagues on the Baltimore County Court, or, indeed, the court of another county, would

consider his decisions very persuasive, we cannot agree that they are in any sense binding." In fact, prior circuit court decisions are not always binding on the same case. **State v Frazier, 298 Md 422, 449 (1984)** (" As a general principle, one judge of a trial court ruling on a matter is not bound by the prior ruling in the same case by another judge of the court...."). Appellant's assertion that contradictory decisions in separate cases in the circuit court are " unconscionable" does not constitute a legal basis for reversing the circuit court's dismissal of his complaint.

A.

We shall first address whether the

trial court erred in striking appellant's "second affidavit" from the record in this case. Appellant filed his notice of appeal with the circuit court on November 15, 1993. The "Second Affidavit of John H. Douglas" was filed with the circuit court on December 21, 1993, thirty-six days after the appeal was filed. The record had not yet been transmitted from the circuit court to this court.

We initially note that the trial court properly ruled on appellees' motion to bar inclusion of the "second affidavit" in the record on appeal. Maryland Rule 8-413(a) states that "[t]he lower court, by order, shall resolve any dispute whether the record accurately discloses what occurred

in the lower court, and shall cause the record to conform to its decision."

Generally, however, the circuit court loses jurisdiction over all issues raised on appeal when the appeal is filed. **Gilliam v Moog Indus., Inc., 239 Md. 107, 112 (1965); TJB, Inc. Arundel Bedding Corp., 63 Md. App. 186, 195 (1985); Link v Link, 35 Md App. 684, 686 (1977); Rosen Bloom v Electric Motor Repair Co., 31 Md. App. 711, 715 (1976).** Therefore, when the appeal in the instant case was noted, the circuit court lost jurisdiction to take evidence. Further, the appellate court has a purely appellate function; we have no power to consider documents not considered by the trial court in reaching its

decision when we review its decision. **Burke v Burke, 204 Md. 637, 646 (1954).**

Both parties rely on the Court of Appeals decision in **Burke** to support their arguments. The appellant in Burke filed a "Petition to Amend Appeal," in which he sought to renounce part of a stipulation agreed to at trial and to incorporate certain documents into the record that were not part of the record below. Id. at 645-46. The Court of Appeals stated:

"The Appellant by these petitions attempts, not only to repudiate a part of his stipulation, but also to introduce additional evidence in the case. We have no power to inspect documents or consider evidence which was not offered below to

determine whether the findings were correct..."...We must deal with cases as they are bought before us by the record transmitted from the court below, and we have no power, whilst reviewing a particular order from which an appeal has been taken, to receive evidence or to remend the record for the court below to hear testimony on totally different questions that in no way reflect on the only issue brought to this court for review." Id. at 646 (Citations omitted) (quoting Stanley v Safe Deposit & Trust Co., 87 Md 450 (1898).

Appellant contends that the latter portion of the above quote from Burke suggests that we may review evidence not

submitted below if it touches on the issues on appeal, but not if it touches different questions. Appellant misinterprets the case and misreads the sentence in question. The Court of Appeals stated we have no power to receive evidence or remand for testimony on new questions. This phrase is disjunctive; it establishes that we lack the power to take either action. The correct interpretation of this language in Burke is that this court cannot receive evidence not admitted before the trial court. It does not matter that appellant filed the affidavit with the circuit court clerk. The circuit court no longer had jurisdiction in the case.

We also reject appellant's reliance on

Hartley v State, 238 Md. 165 (1965), where, in a criminal appeal, the court of Appeals considered the transcript of a post conviction proceeding in order to avoid a substantial injustice. The trial court's ruling will not result in a substantial injustice in the instant civil case.

The trial court requested memoranda from the parties on appellant's motion for reconsideration. The memoranda were due on August 6, 1993, and appellant submitted his on August 4, 1993. Appellant states that he was unable to rebut statements made by appellees in their memoranda, submitted to the trial court on August 6, 1993. The final order in this case,

however, was not entered until November 8, 1993. Appellant had three months in which to submit relevant evidence to the trial court. He did not. Further, it was appellant who, seven days after the final judgment, filed the notice of appeal, divesting the circuit court of jurisdiction to consider additional evidence in this case.

Our role is to review the trial's court decision in light of the evidence before it at the time the decision was made. See generally, Md Rule 8-131(a). It is apparent from appellant's discussion of this issue in his brief that his affidavit addressed facts known to him from the commencement of this litigation and,

further, that the averments in the " second affidavit" are all contained elsewhere in the record. The trial court did not err in ordering " that the 'Second Affidavit of John H. Douglas' shall not constitute any part of the record or record extract for appeal."

B.

Appellant contends that the trial court erred in applying Maryland law to the res judicata issues. The trail court found that appellant's complaint was res judicata because of the decision of the United States District Court for the Eastern District of Virginia. In determining the preclusive effect of a federal case on state court proceedings,

the general rule is that federal law applies; however, when the application of res judicata touches on substantive state law issues, such as privity or the legal relationships of parties, we hold that state law applies. Brooks v Arlington Hosp. Ass'n., 850 F.2d 191, 195 (4th Cir 1988); Harnett v Billman, 800 F.2d 1308, 1312-13 (4th Cir 1986), cert. denied, 480 US 932 (1987); Spiker v Capitol Milk Producers Cooperative, Inc. 577 F. Supp. 416, 417-18 (W.D. Va. 1983).

Spiker squarely addressed the issue of what preclusion law applies when the first judgment is rendered in a federal forum. **[s]tate res judicata rules [may well apply] where the principles in question**

concern substantive rather procedural policies. In the latter, a federal rule should probably be followed. As to the former, however, Erie R.R. v Tompkins, 304 US 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and its progeny, particularly Byrd v Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed. 953 (1958), suggest that state law should govern. See 18 C. Wright, A. Miller, & E. Copper, Federal Practice and Procedure S 4472 (1981). For example, the concept of "privity" in res judicata doctrine reflects a distinctly substantive policy, because privity arises from " considerations going to stability of legal

relationships not unlike definitions of property." Restatement (Second) of Judgment S 87 comment b (1980). Spiker, 577 F.Supp. at 418. See also Arlington Hosp. Ass'n., 850 F.2d at 195; Harnett, 800 F.2d at 1313 (both acknowledging, but not applying, the exception).

In Spiker, a passenger car struck a milk truck parked in the emergency lane of a highway; four of the car's passengers died as a result of the accident. 577 F. Supp at 417. The estate of one passenger sued the defendants. The jury returned a defense verdict. The other plaintiffs in the case then brought suit on the same substantive allegations. " The question

thus becomes whether principles of res judicata preclude this plaintiff not a party to the first suit from relitigating the liability of the defendants."Id. The court held that whether the plaintiff were in privity with the plaintiff in the first suit was a substantive question of law, and thus state law (Virginia law in that case) should be applied when deciding the issue.

Appellant makes the disjointed argument that"[s]ince the trial court found that appellant was not in privity with Baker, then the application of res judicata does not touch on privity and thus federal law, not state law governs the preclusive effects of res judicata

(claim or issue preclusion). The trial court made decisions out of sequence." It is appellant's argument, not the trial court's decision, that is out of sequence. Determining privity or identification of parties is an element of a res judicata analysis. The court must first decide if privity or some other substantive issue must be decided; it must, then state law governs. In other words, when determining whether a federal court judgment is res judicata as to a state court proceeding, the court looks to see if privity, the legal relationship of the parties, or some other substantive issue must first be decided; if it must, then state res judicata analysis properly governs.

In the case at bar, the preclusion issue is one of more than simply the scope and effect of a prior United States District Court judgment. See Arlington Hosp. Ass'n, 850 F.2d at 195. There is a significant issue as to appellant's privity with the plaintiffs in the federal district court suit or as to whether he was sufficiently involved in that litigation to be considered a party. We have discovered no Maryland cases addressing the issue of whether federal or state law applies in the instant situation. The federal cases discussed above make a persuasive case for applying state law. We, therefore, hold that identity of parties is a substantive issue

that must be decided by applying state law. The trial court properly determine that Maryland res judicata law applies.

C.

Appellant alleges that the circuit court erred in determining that he was sufficiently involved in the Virginia action to be considered a party for the purposes of res judicata, and argues, therefore, that his circuit court claim is not precluded.

The Court of Appeals addressed the doctrine of res judicata in deLeon v Slear, 328 Md. 569, 579-80 (1992):

In Alvey v Alvey, 225 Md. 386, 390, 171 A.2d 92, 94 (1961), this court set forth the traditional rule of res judicata

as follows:

> **"The doctrine of res judicata is that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as well to all matters which with propriety could have been litigated in the first suit..."**

The rule is designed to avoid the " expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibilities of inconsistent decisions." Murray

International freight Corp. v Graham, 315 Md. 543, 547, 555 A.2d 502, 503-504 (1989), quoting Montana v United States, 440 U.S. 147, 153-154, 99 S.Ct. 970, 973-974, 59 L.Ed.2d 210,217 (1979).

Recently, in Major v First Virginia, 97 Md. App. 520, 533-34 (1993), we reiterated the elements of res judicata. Under Maryland law, the requirements of res judicata or claim preclusion are:

> 1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute, 2) that the claim presented in the current action is identical to the one determined in the prior adjudication, and 3) that there was a

valid final judgment on the merits. Esslinger v Baltimore City, 95 Md. App. 607, 616-17, 622 A.2d 774 (1993) (citing Cassidy v Bd. of Educ., 316 Md. 50, 57, 557 A.2d 227 (1989). See also Jenkins v Cameron & Hornbostel, 91 Md. App. 316, 334-35, 604 A.2d 506, cert.. denied, 327 Md. 218, 608 A.2d 780 (1992); Lone v Montgomery County, 85 Md. App. 477, 490-91, 584 A. 2d 142 (1991). All three elements must be present for the final judgment in the first claim to bar the subsequent claim. Id.

See also deLeon, 328 Md. at 580. We shall discus the three elements of res judicata separately.

1. Same Party or Privity

The trial court found that appellant was not in privity with the Bakers in their federal lawsuit, " if ... privity is given the generally accepted meaning of one who has succeeded to an estate or interest held by one who was a party to such judgment or decree, if the succession occurred after the bringing if the action." It found, however, that appellant" is considered a party for the purposes of res judicata since there existed a right to control the Virginia action - a right which [appellant] consistently exercised." Appellant contends that the trial court erred in determining that he was a party for the purposes of res judicata.

Ugast v La Fontaine, 189 Md. 227 (1947), presents a similar situation. Ugast and his business partners employed Harry Wilson as their bookkeeper. Wilson embezzled approximately $44,000 from the business and lost it gambling at a club owned by LaFontaine. I. at 229. In a previous action, Wilson sued LaFontaine under a criminal stature allowing a person who lost money gambling to recover the money as a debt owed to the gambler; he recovered $30,000.Id at 230-31. The judgment to Wilson was entered "to the use of" Ugast and his partners. Ugast and his partners then sued LaFontaine directly to recover the same monies. After discussing the principle of res Judicata the court

opined:

In the case before us the subject matter is the same as in the former suit. Both suits were filed by the same attorneys against the same defendants on the same day in the same court, and both were brought to recover money lost by the same person at gaming tables operated by the same defendants. The evidence that would be needed to establish the allegation in this case would be the same that supported the former case...The only difference is that in the former case the gambler brought suit as the loser of the money, whereas in this case the persons from whom the money was stolen claim to be the owners of it. It is evident that the attorneys filed two separate cases in an abundance of caution so that if one case were ruled out the other might be sustained.

Id at 231. The court then analyzed the elements of res judicata, and reached the issue of identity of parties.

> **The only remaining question is whether there is an identity of parties. It is well established that a judgment may not be pleaded only by**

> parties to the action and their privies. Generally, the parties to a suit are those persons who are entered as parties of record. But for the purpose of the application of the rule of res judicata, the term "parties" includes all persons who have a direct interest in the subject matter of the suit, and have a right to control the proceedings, make defense, examine the witnesses, and appeal if appeal lies. So, where persons although not formal parties of record, have a direct interest in the suit, and in the advancement of their interest take open and substantial control of its prosecution, or they are so far represented by another that their interests receive actual and efficient protection, any judgment recovered therein is conclusive upon them to the same extant as if they had been formal parties. In the present case plaintiffs took an active interest in the suit filed by the bookkeeper. They were not parties of record at the time of the trial of his case, but they practically took charge of it, and Wilson was actually suing as constructive trustee for them. Thus it is clear that the claim was res judicata.

Id at 232-33 (emphasis added, Citations

omitted). See also Prescott v Coppage, 266 Md 562, 572-73 (1972); Sterling v Local 438, Liberty Ass'n of Steam and Power Pipe Fitters, 207 Md 132, 144, cert.. denied, 350 U.S. 875 (1955).

In the instant case, the trial court found " ample factual evidence to show [appellant] was not a stranger to the Virginia action." We agree. This case is, upon close review, strikingly similar to Ugast. Here, the Bakers sued the bank, alleging that they were defrauded. The Bakers also owed appellant, by way of the second mortgage, the same money they alleged they were deprived of by the bank - the loan monies. Appellant, through the retainer agreement set forth below, had a

stake in any recovery by the Bakers from the bank. When the Bakers lost their suit against the bank, appellant filed his own suit, seeking to recover the same monies he would have recovered had the Bakers won their Virginia suit. Had Wilson in the Ugast case lost his suit against LaFontaine, Ugast would have been in the same position as appellant in the instant case.

The facts supporting the trial court's finding that appellant was a party include a retainer agreement signed by appellant and Mr. Baker on February 11, 1992, which states:

> **Agreement made by and between Vinson L. baker and Danella M. Baker, first trust holder, and John H. Douglas,**

second trust holder. the parties agree to enter into a retainer agreement relating to or involving the filing of a civil suit against First Federal Savings Bank, Inc., et al, (The Bank).

The terms of the agreement are as follows:

1. The Bakers and Douglas agree to pay to their respective legal counsel(s) at a contingency fee of thirty-five percent (35%0 of the total recovery or settlement...

2. John Douglas agrees to pay legal fees in the amount of $2,000 on behalf of Vinson Baker for legal services in a suit against the bank et al.

3. John Douglas agrees to pay a total of $500.00 for a separate and Independent hearing in Bankruptcy Court.

4. John Douglas agrees to pay a total of $2,000.00 for a civil suit against the bank et al. on his behalf.

5. John Douglas agrees to pay costs of out-of-pocket expenses of [both] suit[s].

6. Vinson Baker will receive Fifty percent (50%) of the sixty five percent (65%) recovery or settlement in this matter.

7. John Douglas shall receive fifty percent (50%) of the sixty five percent of Vinson L. Baker's recovery

or settlement, if any...

8. John Douglas shall forgive $28,000 owed by the Bakers, if the fraud case goes to final verdict or judgment...

9. If John Douglas drops said suit, then Vinson Baker is forgiven on his $28,000.00 note.

10. John Douglas reserves the right to receive his total 2nd trust note amount of $28,000.00 against any title insurance company or party responsible for the title policy. Mr. Douglas' $28,000.00 shall not be shared with the Bakers if recovery is had against the insurer(s) or any liable party.

11. If settlement is made short of judgment then Vinson L. Baker and Danella Baker shall be released from liability for Douglas $28,000.00

12 If [Vinson] Baker loses the motion to vacate the default or loses the adversary proceeding re[garding] fraud alleged by the bank, this agreement is null and void.

13. If either attorney, Frazer Walton Jr., Esq. and John C. LaPrade, Esq. in the fraud suit against the bank withdraws from the suit, for any reason, and both attorneys reserve the right to withdraw, then this agreement is null and void as of the date of withdrawal of either attorney.

Faced with this evidence of , at the very least, an attempt by appellant to gain a direct financial interest in the Bakers' Virginia action, appellant argues that the agreement is not signed by Mrs. Baker, and therefore has no legal effect. Appellant's signature, however, indicates an intent to be bound by the agreement. Had Mrs. Baker signed it at any time, appellant would presumably have been bound by its terms. Putting aside the fact that appellant would likely be arguing otherwise were he entitled to a recovery under the agreement, it is certainly strong evidence that appellant sought a direct financial interest in the suit, and

that his interests were so far represented that he received actual and efficient protection. Appellant's apparent belief that his interests were protected is evidence by the fact that he agreed to forgive the Bakers' $28,000 debt if the suit was successful, or if he (appellant) chose to terminate his or his attorney's involvement in the suit. One evidence at the hearing on the motion for reconsideration, effectively summed up the agreement's importance:

> **But this agreement, I think, speaks volumes as to what their relationship was . There was an agreement that they would split the proceeds of the Virginia suit. There was an agreement that Mr. Douglas would waive his lien against the property of $28,000. And there was an agreement as to counsel. This agreement is void if the two**

> **counsel, who Mr. Douglas now denies he had any part in hiring, dismissed themselves form the case...**
>
> **Mr. Douglas, I think, very importantly, agrees to pay Mr. Baker's attorney's fees and costs and expenses and such in going forward in the Virginia court. For him to stand up here and say," I had no persuasion or no involvement in this Virginia case, and I was just an unhappy, innocent bystander, " I think, is just-- I think this agreement just totally rejects that argument. I just don't think that there's any weight to that argument whatsoever.**

The trial court stated in its opinion that " Douglas' right to control the proceedings, assert a defense, examine witnesses, and appeal, is directly related to his right to intervene..." There was some disagreement about whether appellant's intervention in the Virginia action would destroy federal jurisdiction.

The trial court found that it would not. We need not, however, resolve that question. The fact is that appellant, who was intimately familiar with the litigation and who now presents an almost identical claim, never attempted to intervene in the Virginia action. The trial court cites Reddick v State, 213 Md. 18, 30, cert.. denied, 355 U.S. 832 (1957), for the well established principle of law that a person who has full knowledge of pending litigation and that it affects, and will determine, his rights, and who is entitled to appear, but who makes no effect to intervene as a party, and permits a conclusion thereof without objection, such person is

concluded by the proceedings as effectively as if he were named on the record." See also Psalmist Baptist Church v Bd. of Zoning Appeals, 175 Md. 7, 8-9 (1938); Holt v Moxley, 157 Md. 619, 621 (1929). There was also evidence below that appellant attended at least one deposition in the Virginia action, that he met with witnesses, and that, even if he did not "choose" their attorney, he introduced the Bakers their attorney. Mr. Baker, however, submitted an affidavit stating, in essence, that appellant chose his attorney and controlled the Virginia litigation. In response, appellant submitted his own and Mr. LaPrade's (Mr. Baker's attorney) affidavits contradicting Mr. Baker's

statement. As to the persuasiveness of Mr. Laprade's affidavit, the trial court stated:

> **There are some problems with Mr. LaPrade's affidavit in that he comes to certain conclusions on his own. He concludes that Mr. Douglas did not select Baker's attorneys. Well, how does he know that? He had no control over the prosecution. I assume that he means he didn't exercise any control over him in his prosecution of the case, but it doesn't really say that. It says he had no control over the prosecution.**

Sufficient evidence exists to support the trial court's finds that appellant was involved in the Virginia action, that he had a direct financial interest in the action, that he had the right to intervene in the action (which he chose not to exercise, that he had the right [to] it

control the litigation, and that his interests were represented and received actual and efficient protection. In light of the law and facts discussed above, and upon our careful review of the record, we hold that the trial court did not err in determining that appellant was a party to the Baker's Virginia action for purposes of res judicata.

2. Same Claim or Cause of Action

Appellant argues that his circuit court case and the Bakers' federal case are not identical because the federal court did not specifically rule on each allegation in appellant's complaint. Whether two claims are identical, however,

is not the proper standard of review.

Maryland now applies the "transaction" test when determining whether two cases are the same for the purposes of res judicata. deLeon, 328Md at 589-90; Kent County Bd. of Educ. v Bilbrough, 309 Md 487, 499 (1987) (adopting Restatement (Second) of Judgments S 24). Cases are grouped by "transaction" pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties expectations or business understanding or usage." deLeon, 328 Md.

at 590 (footnote omitted); Bilbrough, 309 Md. at 498 (both quoting Restatement, supra).

In the case at bar, there is little doubt that the Bakers' federal action and appellant's circuit court action are based on the same transaction. The two complaints are based on the bank's award of the same loan. In fact, the Bakers' complaint alleged wrongdoing by the bank based on statements made to them and appellant, and appellant's complaint alleges wrongdoing by the bank based on the same statements made to him and the Bakers. Both transactions occurred at the same time, in the same place, and with the same people. Further, the language of

appellant's complaint substantially parallels that of the Virginia action.

For these reasons, and because appellant does not argue that the two complaints are based on different transactions, we hold that the claims are the same for the purposes of res judicata.

3. Final Judgment

The parties do not dispute that the federal court's dismissal of the Baker's claims based upon motions to dismiss and summary judgment are final judgments. See deLeon, 328 Md at 580 (parties do not dispute that summary judgment in federal court is final judgment on the merits). Appellant does not address the issue in his brief. We need not address it further.

See generally, Md Rule 8-504 (arguments not presented in briefs will not be considered on appeal).

The trial court properly applied Maryland's res judicata law to appellant's complaint. Each of the three elements necessary to preclude a judgment under res judicata has been met. The trial court did not err.

Before concluding, we feel constrained to address appellant's argument that collateral estoppel, and not res judicata, was the proper preclusion law to apply to this case. Judge MOYLAN has recently elucidated the distinction between res judicata and collateral estoppel.

Res judicata looks to a final

judgment on the merits earlier entered in the same case or same cause and to the necessary legal consequences of that judgment... A claim that has once been litigated, or that could have been litigated... cannot, in the interests of finality and repose, be re-litigated...

At that point, however, the two related legal doctrines part company. collateral estoppel is concerned with the factual implications of an earlier litigation of a different case..., whereas res judicata... is concerned with the legal consequences of a judgment entered earlier in the same case... Collateral estoppel is concerned only coincidentally with what happened in the terms of fact finding...

... As Judge (now Chief Judge) Wilner explained for this court in Klein v Whitehead, 40 Md. App. 1, 19, cert denied 283 Md. 734 (1978): For {collateral estoppel] to apply, we must conclude that the issues raised in this proceeding were actually litigated in the earlier actions (or that the facts necessary to resolve these issues were adjudicated in those actions).

Burkett v State, 98 Md. App. 459, 464-65

(1993). The circuit court's conclusion in this case based on the federal court's legal conclusions - that the Bakers' claims were not legally sufficient, and that the defendants were entitled to judgment as a matter of law.

In MPC, Inc. v Kenny, 279 Md. 29, 33 (1977), the Court of Appeals discussed how to distinguish between res judicata and collateral estoppel.

> **If, for example, the two cause of actions are the same, and res judicata is therefore applicable, the first judgment would bar appellants... from raising any matters which could have been decided in that case... If, however, we are not dealing with the same cause of action, collateral estoppel rather than res judicata would apply and only those determinations of fact or issues actually litigated in the first case are conclusive in this action.**

Id. As we discussed above, the relevant causes of action in the instant case are based on the same transaction and are, therefore, considered that same cause of action. Thus, res judicata is the applicable preclusive doctrine.

Appellant cites Montana v United States, 440 U.S. 147 (1979), for the proposition that collateral estoppel, not res judicata, applies to actions by nonparties, because a cause of action by a nonparty is, by definition, definition, different from any preceding action. But because the trial court correctly determined that appellant was a party to the Bakers' suit for the purposes of res

judicata, his circuit court action was not, by definition, different. Also, because privity or sameness of parties is an issue under both res judicata and collateral estoppel, the court cannot be said to have " hitched the horse to the wagon" in not considering the applicability of collateral estoppel before deciding the privity issue. The trial court correctly applied the preclusion doctrine of res judicata.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA, VIRGINIA

VINSON L. BAKER,	)	
	)	
Plaintiff,	)	
v.	)	Civil No.
	)	92-744-A
	)	
FIRST SECURITY FEDERAL SAVINGS BANK, et al.	)	
	)	
	)	
Defendants	)	

O R D E R

This matter comes before the Court on defendant's motions to dismiss and for summary judgment. In its September 4, 1992 order, the Court ordered the following: (i) defendant's motion with respect to

Counts II, III, IV, V, VI, and VIII was granted; (ii) Count I, plaintiff's fraud claim, was taken under advisement; and (iii) summary judgment was denied as to Count VII, plaintiff's civil conspiracy claim.[1] Thus, only Counts I and VII survive, with Count I under advisement. For the reasons stated below, the Court grants summary judgment for the defendants on Count I and after reconsideration of its earlier ruling, grants defendant's motion to dismiss Count VII.

---

[1]Plaintiff incorrectly asserts that " [n]o argument relating to the facts alleged was even permitted " at this hearing on defendant's motions to dismiss and for summary judgment. In fact, both parties were afforded ample opportunity to be heard on the merits of their respective cases.

Count I of plaintiff amended complaint alleges that defendants defrauded plaintiff in connection with a $185,000 construction loan he obtained from defendant First Security Federal Savings Bank, Inc. Plaintiff claims that defendants, individually and collectively, knowingly made false representations, that plaintiff relied on these misrepresentations, and that this reliance resulted in loss and damage to plaintiff.

Since the court has jurisdiction by virtue of diversity of citizenship, the Court must apply the applicable state law relating to fraud...

In conclusion, the Court Orders that summary judgment be Granted in favor of

defendant with respect to Count I and that Count II be dismissed with prejudice. As this order disposes of the only remaining counts in the amended complaint, this matter should be placed among the ended cases .

The clerk is directed to send copies of this Order to all counsel of record.

_____

T. S. Ellis, III
United States District Judge

Alexandria, Virginia
October 22, 1992

APPENDIX D

IN THE CIRCUIT COURT FOR

PRINCE GEORGE'S COUNTY, MARYLAND

JOHN H. DOUGLAS, pro se,

Plaintiff

vs. Civil Action
Law No. 9220856

FIRST SECURITY FEDERAL
SAVINGS BANK, INC., et al.

Defendants

OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Motion For Reconsideration)
(Volume I of I)

Wednesday, July 7, 1993
Upper Marlboro, Maryland

BEFORE:
HONORABLE ROBERT H. MASON, JUDGE

APPEARANCES:
FOR THE DEFENDANTS FIRST SECURITY BANK/ MR. RECTOR/MR. MARIANTHAL (phonetic)/ MS. HUDSON/ MS DAUPHEN(phonetic):

Judy Catterton, esquire

FOR DEFENDANTS GREENBERG, MADDOX AND SHELTON, CHARTERED/ LINDA LAYOW/ LINDA WITT:

JOHN VANDER WOUDE, ESQUIRE

HUNT REPORTING COMPANY
COURT REPORTING AND LITIGATION SUPPORT

Page M-51, Lines 21-24

Mr. Vander Woude: Also, the bank is a Delaware corporation. Mr. Douglas has said he's a Maryland resident, so there would have been diversity in that regard, anyway, even though, certainly, they do business in Maryland.

APPENDIX E

UNTIED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VINSON L. BAKER *

APPELLANT *

vs. * APPEAL NO. 92-2488

FIRST SECURITY *
FEDERAL SAVINGS
BANK, et al. *

APPELLEES *

MOTION TO WITHDRAW

John C. LaPrade, attorney for Appellant, Vinson L. Baker, moves to withdraw as attorney of record. Frazer Walton, Jr., Esquire, is not admitted in the Fourth Circuit Court of Appeals and will not proceed as counsel, in any event.

Appellant's counsel, John C. LaPrade has developed irreconcilable differences with Mr. Baker, as to Mr. Baker's contractual obligations for attorney's fees and costs. Mr. Baker has refused to sign any agreement authorizing representation or payment for the appeal whatsoever, or to recognize his obligations to counsel, John C. LaPrade. Mr. Baker has made no Payment for the appeal.

According, John C. LaPrade moves that he be relieved of the obligations of representing Appellant Baker, immediately. The case is meritorious and deserves to be heard.

Respectfully submitted,

LaPrade & Associates

_____

John C. Laprade

APPENDIX F

Release and Reaffirmation of Loan Documents

KNOW ALL MEN BY THESE PRESENTS, that Vinson L. Baker and Danella Baker in consideration of the sum of $8,000.00, to them in hand paid by First Security Federal Savings Bank, the receipt and sufficiency of which is hereby acknowledged, have remised, released, and forever discharged, and by these presents do for their heirs, executors, and administrators, remise, release, and forever discharge the said First Security Federal Savings Bank and Greenberg, Maddox & Shelton, Chartered, Michael J. Shelton and Robert A. Greenberg, their respective

successors, assigns, employees and agents of and from any and all actions and causes of actions, claims and demands whatsoever, whether known or unknown and whether or not well founded in fact or in law , and of and from any and all manner of suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, controversies, agreements, promises, trespasses, damages, judgments, executions, claims and demands whatsoever in law or in equity which the undersigned have had or may have for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the date of these presents to include but not limited to Civil No. CAL

92-20920 filed in the Circuit Court for Prince George's County, Maryland (Baker, et ux. vs First Security Federal Savings Bank, et al.) and Appeal No. 92-2488 filed in the United States Court of Appeals for the Fourth Circuit (Vinson L. Baker vs. Edwin Rector, et al.) which is an appeal of Civil No. CA-92-744-A filed in the United States District Court for the Eastern District of Virginia, Alexandria Division.

Upon execution of this release, Vinson L. Baker and Danella Baker agree to dismiss, with prejudice, any and all pending court actions or appeals filed by them against First Security Federal Bank, its agents, employees, or attorneys,

including the aforementioned Prince George's County, Maryland and United States District Court for the Eastern District of Virginia cases.

Additionally, the undersigned hereby represent and warrant that if there are defenses existing against the Note dated November 15, 1989 the Deed of Trust which secures said Note, or any other loan documents evidencing a certain loan which is the subject of the civil proceedings mentioned aforesaid and filed in the Circuit Court for Prince George's County, Maryland and the United States District Court for the Eastern District of Virginia, Alexandria Division, they waive those defenses and agree to the

foreclosure of the Deed of Trust recorded in Liber 7490 at folio 301 of the Land Records of Prince George's County, Maryland and that they will take no action, either directly or indirectly, to interfere with the foreclosure of said Deed of Trust by First Security Federal Savings Bank, its successors and/or assigns. Danella Baker agrees to enter into a Consent Order Grant Relief From Automatic Stay, for the real property known as 13006 Strathaven Circle, Fort Washington, Maryland for Case No. 92-1595 filed in the United States Bankruptcy Court for the District of Delaware.

The parties to this Release agree that the terms and conditions of this

settlement shall remain confidential, and shall not be revealed to any other person or entity at any time.

The undersigned further acknowledge that they have obtained the advice of counsel in this matter or waived the right to do so.

IN WITNESS WHEREOF, Vinson L. Baker and Danella Baker signed on this 10th day of March, 1993.

_____
Vinson L. Baker

_____
Danella Baker

State of Maryland,

County of Montgomery, to wit:

On this 10th day of March, 1993 before

me, the undersigned officer, personally appeal Vinson L. Baker and Danella Baker known to me (or satisfactorily proven) to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same for the purposes therein contained.

IN WITNESS WHEREOF. I hereunto set hand and official seal.

_____

NANCY B. RHODES, Notary Public

My Commission Expires: August 22, 1995

GMS #7358